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**Lemoyne-Owen College and Faculty Organization,
Lemoyne-Owen College. Case 26-CA-20953**

January 17, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and amended charge filed on October 17 and 18, 2002, respectively, the General Counsel issued the complaint on October 24, 2002, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 26-RC-8328 (formerly 25-RC-10120). (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On November 14, 2002, the General Counsel filed a Motion for Summary Judgment. On November 19, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the certification based on the Board's unit determination in the representation proceeding. Specifically, the Respondent contends that the Union was improperly certified because the unit faculty members are managerial employees, and the Union is therefore not a labor organization within the meaning of Section 2(5) of the Act.¹

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to ad-

duce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Memphis, Tennessee, has been engaged in the operation of a private nonprofit liberal arts college.

During the 12-month period ending September 30, 2002, the Respondent, in conducting its operations described above, derived gross revenues (excluding contributions which, because of limitation by the grantor, are not available for operating expenses) in excess of \$1 million. In addition, it purchased and received at its Memphis, Tennessee facility products, goods, and materials valued in excess of \$5000 directly from points outside the State of Tennessee. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held September 4, 2002, the Union was certified on September 17, 2002, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time faculty employed by the Employer at its Walker Avenue campus located in Memphis, Tennessee.

Excluded: All office clerical employees, maintenance employees, guards, and supervisors as defined in the Act, and all other persons.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated September 24, 2002, the Union requested the Respondent to recognize and bargain with it, and, since about September 30, 2002, the Respondent has failed and refused to do so. We find that the Respon-

¹ The Respondent also asserts as an affirmative defense that any events occurring outside the 6 months limitations period specified in Section 10(b) of the Act are time-barred. We find that this defense raises no issue requiring a hearing in this matter. The Respondent's answer admits that the original and amended charges in this case were filed on October 17 and 18, 2002, and served on the Respondent on October 18, 2002, less than 3 weeks after the Respondent's admitted refusal to bargain. Thus, the charges were clearly timely and the Respondent's affirmative defense is without merit.

² Chairman Battista and Member Schaumber did not participate in the underlying representation proceeding. However, they agree that the Respondent has not raised any new matters warranting a hearing in this proceeding, and that summary judgment is therefore appropriate.

dent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after September 30, 2002, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, LeMoyne-Owen College, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Faculty Organization, LeMoyne-Owen College, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time faculty employed by the Employer at its Walker Avenue campus located in Memphis, Tennessee.

Excluded: All office clerical employees, maintenance employees, guards, and supervisors as defined in the Act, and all other persons.

(b) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached

notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 26 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 17, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Faculty Organization, LeMoyne-Owen College, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and

conditions of employment for our employees in the bargaining unit:

Included: All full-time faculty employed by us at our Walker Avenue campus located in Memphis, Tennessee.

Excluded: All office clerical employees, maintenance employees, guards, and supervisors as defined in the Act, and all other persons.

LEMOYNE-OWEN COLLEGE